United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

NO. 76-4073

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

DISTRICT 1199, NATIONAL UNION OF
HOSPITAL & HEALTHCARE EMPLOYEES, RWDSU, AFL-CIO,

Respondent.

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P/S

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUE PRESENTED

Whether the Board properly found that respondent District 1199 violated Section 8(g) of the Act by picketing at First Healthcare's Parkway Pavilion without first giving 10 days' notice to First Healthcare and the Federal Mediation and Conciliation Service.

STATEMENT OF THE CASE

This case is before the Court on the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act (the "Act"), as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C., Sec. 151, *et seq.*), for enforcement of its order (A. 40-41), issued against District 1199, National Union of Hospital & Healthcare Employees, RWDSU, AFL-CIO. The Board's decision, by Members Jenkins, Penello, and Walther, Chairman Murphy and Member Fanning dissenting, issued on January 14, 1976, and is reported at 222 NLRB No. 15 (A. 33-43). This Court has jurisdiction, the unfair labor practice having occurred in Enfield, Connecticut.

I. THE BOARD'S FINDING OF FACT

First Healthcare Corporation operates a health care institution at Enfield, Connecticut, called Parkway Pavilion, where the service and maintenance employees are represented by Local 531, Service Employees International Union, AFL-CIO (A. 34, 19; 14). The collective-bargaining agreement between Local 531 and First Healthcare covering the Parkway Pavilion expired on December 1, 1974 (A. 34, 19; 14). On December 9, 1974, Local 531 gave First Healthcare written notice of its intention to strike at 12:01 a.m. on December 20, 1974, and the strike actually began on December 22, 1974 (A. 34, 19; 14).

On January 4, 1975, four officers of District 1199 – Ralph Gonzales, Merrilee Millstein, Thomas Doyle, and Kenneth Doyle – joined Local 531's picket line at the Parkway Pavilion for one and a half hours, wearing "District 1199" caps and badges (A. 34; 6, 11, 14-15). District 1199, which did not represent any Parkway Pavilion employees, engaged in this picketing without having given written notification of its intention to do

so either to First Healthcare or to the Federal Mediation and Conciliation Service (A. 34, 19; 15).

II. THE BOARD'S CONCLUSION AND ORDER

On the foregoing stipulated facts, the Board found that District 1199 had violated Section 8(g) of the Act by picketing the Parkway Pavilion without giving the required notices. In so finding, the Board rejected District 1199's contention that First Healthcare was adequately apprised of the impending picketing by virtue of the notice provided by Local 531, noting that it "may very well be that suppliers, nonstriking employees, and strike replacements, who may be willing to cross one union's picket line, will refuse to do so if another labor organization begins picketing."

The Board's order (A. 40-41) requires District 1199 to cease and desist from engaging in any strike, picketing, or other concerted refusal to work at the premises of Parkway Pavilion, or any other health care institution, without providing the 10 days' notice required by Section 8(g), and to post the customary notices.

ARGUMENT

THE BOARD PROPERLY FOUND THAT DISTRICT 1199 VIOLATED SECTION 8(g) OF THE ACT BY PICKETING AT FIRST HEALTHCARE'S PARKWAY PAVILION WITHOUT FIRST GIVING 10 DAYS' NOTICE TO FIRST HEALTHCARE AND THE FEDERAL MEDIATION AND CONCILIATION SERVICE.

Section 8(g) provides in relevant part that a labor organization:

> before engaging in any strike, picketing or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation

> Service of that intention. . . . The notice shall state the date and time that such action will commence.

As shown in the Statement, *supra*, pp. 2-3, District 1199 is a "labor organization" which admittedly picketed "at" the "health care institution" involved in this case without first giving 10 days' notice either to First Healthcare or to the FMCS. Since 8(g), by its terms, proscribes any picketing by a labor organization without giving a 10-day notice, the picketing by District 1199 falls within the literal terms of that prohibition. Accordingly, District 1199 violated Section 8(g) of the Act unless the picketing here is somehow exempted.

1. The purpose of requiring 10 days' advance notice of any strike or picketing at a health care institution – so that the institution would be able to take the steps necessary to insure that no lives would be lost because of the potential disruption of a "surprise" strike or picket line – is clearly relevant to the picketing by District 1199. As the Senate and House Reports stated concerning the 10-day notice:[1]

> It is in the public interest to insure the continuity of health care to the community and the care and well-being of patients by providing for a statutory advance notice of any anticipated strike or picketing. For this reason, the Committee approved an amendment adding a new Section 8(g) which generally prohibits a labor organization from striking or picketing a healthcare institution without first giving 10 days' notice. . . .
>
> The 10-day notice is intended to give health care institutions sufficient advance notice of a strike or picketing to permit them to make arrangements for the continuity of patient care.

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[1] S. Rept. 93-766, 93rd Cong., 2nd Sess. pp. 2, 4; H. Rept. 93-1051, 93rd Cong., 2nd Sess., pp. 2, 5; Legis. Hist. of the Coverage of Nonprofit Hospitals under the National Labor Relations Act, 1974, Public Law 93-360 (S. 3203) (Committee Print November 1974) (G.P.O., 1974), pp. 9, 11, 270, 273.

Since the purpose of sympathy picketing is to lend support to the assisted union – that is, to make its protest more effective – the absence of any dispute between the picketing union and the health care institution does not eliminate the danger to patients from interruption in their care.

2. Statements made in support of S. 3203 prior to its passage contain the clear implication that the notice requirement of Section 8(g) would apply generally to all picketing at a health care institution by any labor organization. Thus, Senator Cranston, in introducing the bill, noted that it contained the "requirement of a 10-day notice by a labor organization to the health care institution before engaging in any picketing or strike – whether or not related to bargaining" (120 Cong. Rec. S.6930 (daily ed. May 2, 1974)). Senator Javits, another sponsor of the bill, stated that the "10 days notice of any strike or picketing, including stranger picketing, must be given to a health care institution" (120 Cong. Rec. S. 6935 (daily ed. May 2, 1974)). As the Board noted (A. 36), during the debate, Senator Taft stated (120 Cong. Rec. S. 6941 (daily ed. May 2, 1974)) that the provision which became the new Section 8(g) of the Act:

> requires that a labor organization give a 10-day written notice to the health care institution and the FMCS before engaging in any picketing, strike or concerted refusal to work. This subsection applies not only to bargaining strikes or pickets, but also, as stated in the statute, to "any picket or strike." As examples, this subsection would apply to recognition strikes, area standard strikes, jurisdictional strikes, and the like.[2]

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[2] In *Lein-Steenberg*, 219 NLRB No. 153, 89 LRRM 1770 (1975), the Board quoted the above statement of Senator Taft in support of its interpretation of Section 8(g) as requiring a 10-day notice prior to picketing by a construction union of a contractor engaging in construction at a hospital. In November 1975, shortly after the Board's decision issued and during the debate on proposed "construction proviso" legislation, Senator Taft stated that his reference in the earlier debate to "any picket

(continued)

Thus, the legislative history supports the Board's view that the notice requirement should be interpreted broadly to meet the Congressional concern that health care institutions receive appropriate notice as to impending picketing of any sort.

3. The Board properly rejected District 1199's contention that the picketing here neither changed the character of the Local 531's picketing nor broadened its objectives and hence did not require any additional notice.[3] As the Board noted (A. 37), the purpose of the 10 days' notice is to allow the institution "to assess the extent to which normal operations are likely to be disrupted, [and it] may very well be that suppliers, nonstriking employees, and strike replacements, who may be willing to cross one union's picket line, will refuse to do so if another union begins picketing." Indeed, as noted above, the very purpose of sympathy picketing is to augment the impact of the picketing by the assisted union, and District 1199's officials, by wearing caps and badges reading "District 1199" sought to add that union's presence to what was formerly picketing by a union with a different constituency.

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[2] (continued) or strike" referred only to *types* of picketing and should not have been interpreted to include picketing at a hospital where the picketing was directed, not at the hospital, but at a construction employer (121 Cong. Rec. S. 20466 (daily ed. November 19, 1975)). As noted in the text, the picketing here *was* directed at a health care institution, in sympathy with Local 531's bargaining position, and hence Senator Taft's comment relied on by the Board here, which expresses an intention to cover all *types* of picketing, is unquestionably relevant.

[3] District 1199's related contention that its picketing was *de minimis* is subject to the same infirmities as the defense treated in the text. Moreover, the *de minimis* contention confronts in addition the established principle that "[t]he Board . . . is vested with the powers to proceed with such [allegedly] trivial matters if it wishes and issue a remedial order." *American Telephone & Telegraph Co. v. N.L.R.B.*, 521 F.2d 1159, 1160 n. 2 (C.A. 2, 1975).

The identity of the picketing union is relevant in another respect, for as noted in the legislative history (emphasis supplied):[4]

> This [10-day] notice period will also give the National Labor Relations Board the opportunity, when charges are filed, to make a determination as to the legality of any strike or picketing *before* it occurs.[1]

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[1] For example, the picketing may be a violation of Section 8(b)(4).

Obviously, notice that one union will begin picketing is not notice that another union, with possibly a different legal relationship to the institution, will picket. Yet without such notice the Congressional objective of allowing an opportunity to file charges before the picketing occurs may be frustrated.

District 1199's real contention in this respect is that the legality of picketing should turn, not on the fact of picketing and the absence of the 10-day notice, but on the *effects* of the picketing. For if the presence of District 1199's representatives had turned back a vital delivery of the sort which had previously been made through Local 531's picket line and a patient had died, District 1199 would not be contending that Local 531's notice was adequate or that District 1199's conduct was *de minimis*. The legislative history makes clear, however, that Congress never intended 8(g) as a remedy for disruption caused by picketing at a health care institution. Rather, as noted above, Congress enacted 8(g) to give sufficient *advance* notice to the health care institution and the Board so that disruption might

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[4] See n. 1, *supra*, p. 4. The precise quotation here is from the Senate Report. The House report substitutes "might" for "will" and omits the footnote.

be avoided or minimized. Unions were made responsible, not for avoiding untoward effects of picketing, but for giving proper notice. Thus, for purposes of Section 8(g) any inquiry into whether the picketing actually disrupted health care services is irrelevant. While the approach followed by the Board, in effect, requires all labor organizations to serve notice on a health care institution in any case in which it may be affected by the picketing contemplated, the approach advocated by District 1199 would encourage unions to call short "surprise" strikes in the hope that at a later hearing the General Counsel would be unable to prove that the strike had an actual effect on the institution's operations. The legislative concerns discussed above, we submit, call for the approach utilized by the Board.

In sum, we submit that the Board properly construed Section 8(g) according to its terms and held that by picketing without giving the required notices, District 1199 violated that section of the Act. In making this determination the Board exercised its "special function of applying the general provisions of the Act to the complexities of industrial life." *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). Accordingly, there is particular force here to the Supreme Court's injunction that "[t]he administrative interpretation of [a statute] by the enforcing agency is entitled to great deference." *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *N.L.R.B. v. Hearst Publications*, 322 U.S. 111, 130-131 (1944).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a judgment should be entered enforcing the Board's order in full.

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June 1976

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	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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Dated at Washington, D. C.

this 18th day of June, 1976.